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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
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Application of BellSouth Corporation,	)	
BellSouth Telecommunications, Inc.	)	CC Docket No. 97-208
and BellSouth Long Distance, Inc.	)	
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to Provide	)	
In-Region, InterLATA Services in South Carolina	)	

REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Raymond G. Bender, Jr.
J.G. Harrington
Cécile G. Neuvens

Its Attorneys

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2000

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SUMMARY

BellSouth's application for in-region interLATA authority in South Carolina cannot be granted. The legal theories advocated by the BOCs are inconsistent with the law, so BellSouth cannot take advantage of "Track B." Equally important, the flaws in BellSouth's application that were outlined in Vanguard's initial comments were confirmed by other parties.

First, Track B is not available. While the BOCs argue that the "implementation schedule" condition in Track B is met if agreements do not contain such schedules, the opposite is true. BellSouth always had the power to demand that its interconnection agreements include implementation schedules and, consequently, it must bear the burden of having failed to make such demands. Moreover, the record contains overwhelming evidence that facilities-based competitors are taking reasonable steps towards entering the South Carolina market, steps that the South Carolina Public Service Commission ignored when it uncritically adopted BellSouth's proposed order in the state-level proceeding.

Second, BellSouth is not complying with its reciprocal compensation obligations. Vanguard earlier established that BellSouth impermissibly denies compensation for calls to enhanced service providers. The comments show that this refusal to provide reciprocal compensation also extends to paging providers. Either one of these actions would be sufficient to prevent BellSouth from meeting its checklist requirements.

Third, BellSouth continues its longstanding practice of anticompetitive marketing behavior. The comments show that BellSouth is repeating the practices that this Commission and two states decried in the MemoryCall proceedings, but this time in an effort to steal local

exchange customers from its competitors. This behavior shows that BellSouth is not ready to enter the long distance market because it does not understand fair competition.

Rather than relying on the wholly inadequate efforts of the South Carolina Public Service Commission, this Commission should take its cue from the Department of Justice, which engaged in a detailed evaluation of the competitive landscape in South Carolina. On the basis of that evaluation and the facts provided to the Commission by other parties, it is evident that BellSouth's application must be denied.

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REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding.[1/] Vanguard notes that the comments filed in opposition to BellSouth's application are entirely consistent with Vanguard's own comments. The other commenters provide additional evidence that BellSouth does not satisfy Section 271 requirements and engages in anticompetitive practices that belie BellSouth's claim that its entry into the interLATA market would be in the public interest.

Consequently, Vanguard agrees generally with these comments and, in this reply, addresses only some of the most important issues discussed in these comments, in particular (i) the availability of Track B; (ii) the progress towards the provision of facilities-based competition; (iii) the absence of reciprocal compensation; and (iv) BellSouth's other anticompetitive practices. Finally, Vanguard urges the Commission to follow the Department of

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1/ *See* Comments Requested on Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina, *Public Notice*, CC Dkt. No. 97-208, FCC 97-2112 (rel. Sept. 30, 1997). For convenience of reference, Vanguard will use the term "BellSouth" to refer to the applicant entities collectively.

Justice's recommendation to reject BellSouth's application until BellSouth has satisfied all of its statutory obligations.

I. TRACK B IS NOT AVAILABLE IN SOUTH CAROLINA AT THIS TIME

Ameritech's claim that Track B is available due to the absence of implementation schedules in the interconnection agreements is incorrect. According to Ameritech, BOCs should have a right to pursue Track B unless (i) one or more competing carriers is providing facilities-based service to residential and business subscribers (*i.e*, Track A is satisfied); or (ii) there is an interconnection agreement that commits the potential competitor to a reasonable schedule for the commencement of such service and that carrier complies with the schedule. Therefore, Ameritech argues, Track B remains available if the interconnection agreement does not contain an implementation schedule because such the absence of implementation schedule permits a requesting carrier not only to delay implementation but also to decline to implement access and interconnection at all.

However, nothing in the record shows that BellSouth or the SCPSC ever requested implementation schedules. Indeed, the SCPSC's AT&T arbitration order fails to adopt an implementation schedule, even though Section 252(c)(3) requires state commissions asked to arbitrate open issues between ILECs and requesting carriers to adopt a schedule for implementation of the terms and conditions by the parties to the agreement.[2/] By failing to require implementation schedules in the interconnection agreements between BellSouth and CLECs, BellSouth and the SCPSC waived the implementation schedule obligation for requesting

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2/ BellSouth's Application at Appendix B, Volume 8, Tab 69 "Order on Arbitration" cited by the Consumer Advocate for the State of South Carolina.

carriers in Section 271(c)(1)(B). Moreover, although requesting carriers were not bound to comply with any implementation schedule, the record shows that they have pursued implementation of their interconnection agreements with BellSouth and that any delay in their entering the local exchange market in South Carolina and elsewhere in BellSouth's regions is much more likely the result of BellSouth's obstruction.[3/]

Under Section 271, the ultimate burden of demonstrating that all of the requirements for authorization to provide in-region, InterLATA services are satisfied remains at all times with the applicant. Once qualifying requests have been made under Section 271, a BOC may proceed under Track B only if the state commission certifies that requesting carriers have failed to negotiate in good faith or that they have failed to comply with an implementation schedule contained in the interconnection agreement. This narrowly-crafted exception permits a BOC to proceed under Track B when, through no fault of its own, its entry into the long-distance market would be delayed indefinitely. Because it did not attempt to include implementation schedules in the interconnection agreements, BellSouth never asked for and the SCPSC never issued, the certification in question. Therefore, the conditions for the availability of Track B are not met.

Finally, it is reasonable to conclude that BellSouth voluntarily failed to request implementation schedules in hopes of availing itself of Track B to enter the long-distance market while delaying entry of CLECs in the local exchange market. Therefore, the Commission should reject the argument that Track B is available.

3/ *See* Vanguard Comments at 10, 15. It is important to distinguish the implementation schedule provision of Section 271(c)(1)(B) from the Commission's determination that Track B should be available if competitors are not making progress towards meeting Track A.

II. THE COMMENTS SHOW THAT COMPETITORS ARE TAKING REASONABLE STEPS TOWARDS ESTABLISHING FACILITIES-BASED COMPETITION

The comments filed in opposition to BellSouth's application demonstrate that CLECs, including ACSI and AT&T, have made qualifying requests that would satisfy Track A requirements, have demonstrated their commitments to provide residential and business local exchange services in South Carolina and are taking reasonable steps to implement their interconnection agreements with BellSouth. The AT&T arbitration is one of many examples of a competitor taking steps to provide facilities-based competition. Similarly, ACSI's comments show that it will have a switch providing dial tone installed in South Carolina in the first quarter of 1998 (a significant factor under the *Oklahoma Order*)[4/] and that it is committed to providing facilities-based local telephone services to both business and residential customers.[5/] Other carriers, such as DeltaCom, also have expressed their intention to provide local exchange services.

The SCPSC and some commenters have argued that the Commission should give deference to the SCPSC's statement that competitors have not taken reasonable steps. The SCPSC, however, did not develop a comprehensive factual record on the status of local competition as required under the *Michigan Order*.[6/] Relying almost entirely on BellSouth's

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4/ Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, *Memorandum Opinion and Order,* CC Docket No. 97-121, FCC No. 97-228 at ¶ 63, fn. 193 (rel. Jun. 26, 1997) (*"Oklahoma Order"*)

5/ ACSI Comments at 14.

6/ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Memorandum*

allegations regarding the level of facilities-based activity in South Carolina,[7] the SCPSC rubber-stamped BellSouth's proposed order without questioning CLECs on their progress towards providing facilities-based competition in South Carolina.[8] In this case, the SCPSC's finding deserves no deference. Even BellSouth is confused about whether the Commission should defer to the SCPSC's assessment of the local market. On the one hand, it requests the Commission to defer to the SCPSC's finding.[9] On the other hand, BellSouth also requests the Commission to investigate whether facilities-based competition already has developed in South Carolina that would authorize BellSouth to proceed under Track A.[10]

The SCPSC's conclusions also are contradicted by the overwhelming weight of evidence in this proceeding. As Vanguard showed in its initial comments, competitors and potential competitors have sought and obtained interconnection agreements, obtained state certification, ordered colocation facilities, trunks and unbundled elements and taken myriad other steps to enter the local telephone marketplace.[11]

Moreover, the SCPSC may have applied a wrong definition of "own telephone exchange service facilities" under Section 271(c)(1)(A) in concluding that there was no facilities-based competition. The SCPSC's order was released on July 31, 1997, prior to the release of the

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Opinion and Order, CC Docket No. 97-137, FCC No. 97-298 (rel. Aug. 19, 1997) (*"Michigan Order"*) at ¶30.

7/ BellSouth Brief at 15-16.

8/ *See* AT&T Comments at 1.

9/ BellSouth Brief at 11.

10/ BellSouth Brief at 16.

11/ Vanguard Comments at 10.

Michigan Order on August 19, 1997. Consequently, the SCPSC could not have known prior to the adoption of the *Michigan Order* that the provision of services through the requesting carrier's "own facilities" encompasses the provision of services offered over unbundled network elements leased from the ILEC. Therefore, the SCPSC was not in a position to assess whether requesting carriers had taken reasonable steps towards providing facilities-based competition and the Commission should not give any weight to the SCPSC's conclusions.

III. BELLSOUTH IS NOT COMPLYING WITH ITS RECIPROCAL COMPENSATION OBLIGATIONS

Vanguard's initial comments showed that BellSouth improperly denies reciprocal compensation for calls to enhanced service providers. The comments of the Paging and Narrowband PCS Alliance of the Personal Communications Industry Association ("PNPA") show that this is not the only instance of failure to comply with the reciprocal compensation obligation. In fact, BellSouth actually continues to charge PNPA members that provide paging services in South Carolina for BellSouth-originated traffic. This violates Section 251(b)(5) of the Act which requires all LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications and BellSouth's reciprocal compensation checklist obligation.[12/] The reciprocal compensation obligation applies to paging providers, as the Commission made it clear in its *Local Interconnection Order*, where it stated that "[a]ll CMRS providers offer telecommunications. Accordingly, LECs are obligated pursuant to Section 251(b)(5) (and the corresponding pricing standards of Section 252(d)(2)) to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers

12/ 47 U.S.C. § 271(c)(2)(B)(xiii).

[...]."[13/] Section 251(b)(5), by requiring BellSouth to compensate paging providers for BellSouth-originated traffic, necessarily prohibits BellSouth from charging paging providers for traffic that originates on its own network. Indeed, state commissions such as the California Public Utilities Commission have interpreted the provisions of the Act as requiring LECs to interconnect with all providers of communications services and to compensate each carrier on reasonable terms and conditions for the costs that it incurs in terminating calls that originate on the LEC's network.[14/]

BellSouth's refusal to pay compensation to paging providers and, as it admits in its brief, enhanced service providers, constitutes a violation of item (xiii) of the checklist requirements, sufficient in itself to justify the rejection of its Section 271 application. It also is an anticompetitive mean of obtaining a *de facto* monopoly on the markets for such services, indicative of the discriminatory treatment that BellSouth intends to apply to many other service providers.[15/]

13/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 at 15997, 16016 (1996) (the *"Local Competition Order"*).

14/ Application of Cook Telecom, Inc. for Arbitration Pursuant to Section 252 of the Federal Communications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell, A. 97-02-003 (May 21, 1997).

15/ *See* Comments of the Independent Payphone Service Providers for Consumer Choice. Another example of BellSouth's unfair practices is the undue coercion it exercises against pay phone location providers that choose a carrier other than that selected by BellSouth.

IV. BELLSOUTH'S CONTINUING ANTICOMPETITIVE PRACTICES SHOW THAT GRANT OF THE APPLICATION WOULD NOT BE IN THE PUBLIC INTEREST

Vanguard's comments described BellSouth's previous anticompetitive behavior in the offering of MemoryCall and how BellSouth proposed to repeat that behavior when it obtains long-distance authority.[16/] The comments of ACSI demonstrate that BellSouth already is engaging in anticompetitive practices as it seeks to shore up its local exchange monopoly.

As shown in ACSI's comments, in South Carolina, Alabama and Georgia, BellSouth engages in an array of anticompetitive practices that are strikingly similar to the MemoryCall experience.[17/] In South Carolina, for example, BellSouth has used the delay caused by its own inability to provide nondiscriminatory operational support systems ("OSS") and unbundled local loops ("ULLs") to contact ACSI's new customers repeatedly and attempt to persuade them that BellSouth could offer better options, often by making false and disparaging comments about ACSI. BellSouth also campaigns to lock customers into multi-year contract service arrangements or, in the case of property management companies, into exclusive marketing arrangements under which property managers are rewarded for promoting BellSouth's services to tenants. BellSouth's marketing practices could not occur without BellSouth passing customer proprietary network information about services ordered by ACSI and other CLECs to its customer representatives.

16/ Vanguard Comments at 21-24.

17/ ACSI Comments at 53-57.

Although these types of anticompetitive marketing behaviors have been held unlawful repeatedly by various state commissions and by the Commission itself,[18/] BellSouth still indulges in the same practices in South Carolina. Such a reckless disregard for the Commission's previous conclusions justifies a rejection of BellSouth's application.

V. THE COMMISSION SHOULD GIVE DEFERENCE TO THE DEPARTMENT OF JUSTICE'S EVALUATION

In the *Michigan Order*, the Commission reiterated that, under Section 271(d)(2)(A) of the Act, the Attorney General is entitled to evaluate the application "using any standard [she] considers appropriate" and the Commission is required to "give substantial weight to the Attorney General's evaluation."[19/] The Commission, furthermore, noted that Congress limited the consultative role of state commissions to verification of BOC compliance with Section 271(c), but imposed no such constraint on the Attorney General.[20/] In any event, the Commission would be required to give substantial weight to the Attorney General's evaluation of the state of local competition and the applicant's compliance with the checklist.[21/]

The Department of Justice has found that BellSouth does not meet the checklist requirements and that the local market is not fully open to competition.[22/] Moreover, unlike the SCPSC's cursory evaluation, the Department of Justice's determination is based on a detailed

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18/ Computer III Remand Proceedings, *Report and Order*, 6 FCC Rcd 7571 at 7613-4 (1991)

19/ *Michigan Order* at ¶35.

20/ *Id.* at ¶ 37.

21/ *Id.* at ¶ 40.

22/ Evaluation of the United States Department of Justice released on Nov. 4, 1997.

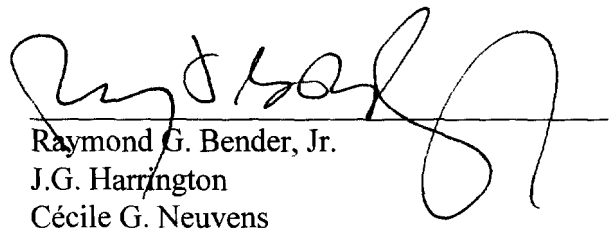
analysis of the actual competitive situation in South Carolina. Therefore, the Commission should follow the Department of Justice's recommendation to reject BellSouth's application to enter the InterLATA market in South Carolina.

VI. CONCLUSION

BellSouth has not met Section 271 requirements and, given its discriminatory practices towards potential competitors, its entry into the InterLATA market is not in the public interest. Therefore, the Commission should not grant BellSouth's application.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.



Raymond G. Bender, Jr.
J.G. Harrington
Cécile G. Neuvens

Its Attorneys

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036-6802
(202) 776-2000

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CERTIFICATE OF SERVICE

I, Cornelia R. DeBose, a secretary with the law firm of Dow, Lohnes & Albertson, hereby certify that a true and correct copy of the foregoing ***REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.*** was served this 14th day of November, 1997 via United States first-class mail, postage prepaid, upon the following:

Counsel for BellSouth Corporation	Walter H. Alford William B. Barfield Jim O. Llewellyn 1155 Peachtree Street, NE Atlanta, GA 30367 David G. Frolio 1133 21st Street, NW Washington, DC 20036 Gary M. Epstein Latham & Watkins 1001 Pennsylvania Avenue, NW Washington, DC 20004
Counsel for BellSouth Long Distance, Inc.	James G. Harralson 28 Perimeter Center East Atlanta, GA 30346
Counsel for BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc.	Michael K. Kellogg Austin C. Schlick Kevin J. Cameron Jonathan T. Molot Kellogg, Huber, Hansen, Todd & Evans, PLLC 1301 K Street, NW Suite 1000 West Washington, DC 20005
Counsel for BellSouth Telecommunications, Inc.	Margaret H. Greene R. Douglas Lackey Michael A. Tanner Stephen M. Klimacek 675 W. Peachtree Stree, NE Suite 4300 Atlanta, GA 30375

Federal Communications Commission	William F. Caton (Original + 11 copies)* Acting Secretary Federal Communications Commission 1919 M Street, NW Room 222 Washington, DC 20554
	Janice Myles (5 copies)* Policy and Program Planning Division Common Carrier Bureau Federal Communications Commission 1919 M Street, NW Room 544 Washington, DC 20554
U.S. Department of Justice	Donald J. Russell (5 copies)* U.S. Department of Justice Antitrust Division, City Center Building 1401 H Street, NW Suite 8000 Washington, DC 20530
	Joe Klein * Acting Assistant U.S. Attorney U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530
South Carolina Public Service Commission	F. David Butler, General Counsel South Carolina Public Service Commission 111 Doctors Circle P. O. Box 11649 Columbia, SC 29211
International Transcription Service	ITS * 1231 20th Street, NW Washington, DC 20036
Counsel for Paging and Narrowband PCS Alliance of The Personal Communications Industry Association	Robert L. Hoggarth Angela E. Giancarlo 500 Montgomery Street, Suite 700 Alexandria, VA 22314-1561

* Delivered by hand.

Counsel for MCI Telecommunications Corporation	Mary L. Brown Keith L. Seat Susan Jin Davis MCI Telecommunications Corporation 1801 Pennsylvania Avenue, NW Washington, DC 20006 Jerome L. Epstein Marc A. Goldman Paul W. Cobb, Jr. Thomas D. Amrine Jenner & Block 601 - 13th Street, NW Washington, DC 20005
Counsel for United Homeowners Association	Jordan Clark President United Homeowners Association 1511 K Street, NW 3rd Floor Washington, DC 20005
Counsel for American Council on Education	Sheldon Elliot Steinbach Vice President & General Manager American Council on Education One Dupont Circle, NW Washington, DC 20036
Counsel for National Association of College and University Business Officers	Christine E. Larger Director, Public & Management Programs National Association of College and University Business Officers 2501 M Street, NW Washington, DC 20037
Counsel for U S West, Inc.	Laurie J. Bennett John L. Traylor 1020- 19th Street, NW Suite 700 Washington, DC 20036

Counsel of Teleport Communications Inc.	J. Manning Lee Vice President, Regulatory Affairs Teleport Communications Group Inc. One Teleport Drive Suite 300 Staten Island, NY 10311 Michael A. McRae Senior Regulatory Counsel 1133 - 21st Street, NW Suite 400 2 Lafayette Centre Washington, DC 20036
Counsel of LCI International Telecom Corp.	Douglas W. Kinkoph Director, Regulatory & Legislative Affairs LCI International Telecom Corp. 8180 Greensboro Drive Suite 800 McLean, VA 22102 Rocky N. Unruh Morgenstein & Jubelirer One Market Spear Street Tower 32nd Floor San Francisco, CA 94105 Eugene D. Cohen Bailey Campbell PLC 649 North Second Avenue Phoenix, AZ 85003

Counsel for Ameritech	Kelly R. Welsh John T. Lenahan Gary L. Phillips Ameritech 30 South Wacker Drive Chicago, IL 60606 Theodore A. Livingston Douglas A. Poe John E. Muench Gary Feinerman Mayer, Brown & Platt 190 South LaSalle Street Chicago, IL 60603
Counsel for The Gleason Works, GenCorp., Norfolk Southern Corp., PNC Bank, and Zurn Industries, Inc.	c/o Thomas M. Coburn Telecom Manager The Gleason Works P. O. Box 22970 Rochester, NY 14692-2970
Counsel for Low Tech Designs, Inc.	James M. Tennant President Low Tech Designs, Inc. 1204 Saville Street Georgetown, SC 29440
Counsel for Ad Hoc Coalition of Telecommunications Manufacturing Companies and Corporate Telecommunications Service Managers	Rodney L. Joyce Ginsburg, Feldman & Bress 1250 Connecticut Avenue, NW Washington, DC 20036
Counsel for Public Service Commission of South Carolina	Gary E. Walsh Deputy Executive Director Public Service Commission of South Carolina 111 Doctors Circle Columbia, SC 29203
Counsel for Intermedia Communications Inc.	Jonathan E. Canis Enrico C. Soriano Kelley, Drye & Warren, LLP 1200 - 19th Street, NW Suite 500 Washington, DC 20036

Counsel for Hyperion Telecommunications, Inc. and KMC Telecom, Inc.	Antony Richard Petrilla Swidler & Berlin, Chartered 3000 K Street, NW Suite 300 Washington, DC 20007-5116
Counsel for WorldCom, Inc.	Catharine R. Sloan Richard L. Fruchterman, III Richard S. Whitt WorldCom, Inc. 1120 Connecticut Avenue, NW Washington, DC 20036-3902 Andrew D. Lipman Robert V. Zener Swidler & Berlin, Chartered 3000 K Street, NW Suite 300 Washington, DC 20007-5116
Counsel for The Competitive Telecommunications Association	Genevieve Morelli Executive V.P. & General Counsel The Competitive Telecommunications Association 1900 M Street, NW Suite 800 Washington, DC 20036 Danny E. Adams Steven A. Augustino Kelley, Drye & Warren, LLP 1200 - 19th Street, NW Suite 500 Washington, DC 20036
Counsel for Consumer Advocate for the State of South Carolina	Philip S. Porter Nancy Vaughn Coombs Elliptt F. Elam, Jr. South Carolina Department of Consumer Affairs P. O. Box 5757 Columbia, SC 29250-5757

Counsel for Telecommunications Resellers Association	Charles C. Hunter Catherine M. Hannan Hunter Communications Law Group 1620 I Street, NW Suite 701 Washington, DC 20006
Counsel for Association of Local Telecommunications Services	Richard J. Metzger Association of Local Telecommunications Services 1200 - 19th Street, NW Suite 560 Washington, DC 20036
Counsel for Sprint Communications Company L.P.	Leon M. Kestenbaum V.P. and General Counsel, Federal Sprint Communications Company, L.P. 1850 M Street, NW Washington, DC 20036
	Philip L. Verveer Sue D. Blumenfeld Thomas Jones Gunnar Halley Wilkie, Farr & Gallagher Three Lafayette Centre 1155 - 21st Street, NW Washington, DC 20036-3384
Counsel for The South Carolina Cable Television Association	Christopher W. Savage Cole, Raywid & Braverman, L.L.P. 1919 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006

Counsel for AT&T	Mark C. Rosenblum Leonard J. Cali Roy E. Hoffinger Stephen C. Garavito Vivian V. Furman Karen E. Weis AT&T Corp. 295 North Maple Avenue Basking Ridge, NJ 07920 Kenneth P. McNeely AT&T Corp. 1200 Peachtree Street, NE Promenade I, Room 4036 Atlanta, GA 30309 David W. Carpenter Mark E. Haddad Ronald S. Flagg Lawrence A. Miller George W. Jones, Jr. Richard E. Young Sidley & Austin 1722 Eye Street, NW Washington, DC 20006
Counsel for The Independent Payphone Service Providers for Consumer Choice	Charles H. Helein Helein & Associates, P.C. 8180 Greensboro Drive Suite 700 McLean, VA 22102

Counsel for American Communications Services, Inc.

Riley M. Murphy
Executive Vice President
& General Counsel
American Communications Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
John J. Heitmann
Kelley, Drye & Warren, LLP
1200 - 19th Street, NW
Suite 500
Washington, DC 20036

Cornelia R. DeBose